Nos. 83-245, 83-291

In the Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND

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ARGUMENT

Introduction

R. A. Gray & Company ("Gray") has structured its answering brief in this Court around the following argument:

1. If Gray did not receive adequate advance notice of the retrospective aspects of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act"), those retrospective aspects require "special justification" or the due process clause of the Fifth Amendment is violated.

2. Gray did not receive adequate advance notice.

3. "Special justification" for the retrospective aspects of the Act has not been shown.

4. Hence, the retrospective aspects of the Act are unconstitutional.

In order to sharpen the issues presented to this Court, the Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Trust Fund") will summarize its position in parallel propositions.

1. "Special justification" is a rubric of Gray's own formulation. If Gray did receive adequate advance notice of the Act's retrospective aspects, then Gray must establish that the action of Congress was "arbitrary and irrational," or its due process challenge to the Act's presumptive constitutionality will fail. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

2. Because legislative process provides adequate advance notice, Gray received notice.

3. The Act meets the rationality standard of *Turner Elkhorn*. Even Gray does not deny this.

4. Thus, the Act is constitutional in its retrospective application.

The parallel premises of these diverging arguments pose three issues. First, what is the appropriate standard of due process review? Gray has not disputed the correctness of the Trust Fund's position that if notice accompanied the enactment of the Act, then if the Act is rational, it is constitutional. Rather, Gray argues that if notice was absent, then some undefined requirement of "special justification" should supplant the traditional means-ends rationality test. Thus, the parties' positions raise two questions. If the Act suffers no defect of notice, how does the *Turner Elkhorn* rationality analysis apply to the Act's retrospective aspects? Alternatively, if the Act passed without legislative notice, what "special justification," if any, does due process require? Section I addresses these questions.

Second, does the legislative process provide adequate advance notice? The legislative procedures whereby the Act became law were quite typical and proper. Gray does not deny this. Thus, if legislative process provides legislative notice, Gray had notice. This matter is discussed in Section II.

Third, does the Act pass substantive due process review? Does it pass review on the accepted standard

of *Turner Elkhorn?* Does it pass review if "special justification" is required? Section III provides brief discussion of these questions.

Eschewing the more common method of argument in the alternative and structuring the issues through the above parallel propositions enables the Trust Fund to offer the Court a better map of the lay of the land in this case. The Trust Fund is aware, however, that this method also directs attention to issues the Court may not need to address. Thus, for instance, if the Court agrees that in this instance legislative process provided legislative notice, the Court will not have to consider Gray's contention that the Act lacked "special justification."

I. Alternative Standards of Due Process Review

Any "due process analysis properly begins with a discussion of the appropriate standard of review." *Duke Power Co.* v. *Carolina Env. Study Gp.*, 438 U.S. 59, 82 (1978). The traditional standard of due process review of legislation "adjusting the burdens and benefits of economic life" is the deferential yardstick applied in *Turner Elkhorn:* Has Congress adopted a rational means to a legitimate end?

Gray does not deny that the traditional due process analysis applies in this instance if Congress provided notice of the Act. Gray argues instead that if Congress did not provide notice, the retrospective aspects of the Act require some unspecified "special justification."

A. The Turner Elkhorn Rationality Standard

Turner Elkhorn states the recognized standard of review if this Court either does not recognize a legislative notice requirement, holds that legislative process is legislative notice, or otherwise concludes that Gray received such notice as was constitutionally due.[1]

Turner Elkhorn formulates and applies the *same test* for assessing the due process adequacy of both prospective and retrospective features of legislation. The test is whether "the legislature has acted in an arbitrary and irrational way," 428 U.S. at 15; and the burden is upon the complaining party to establish the absence of rationality. *Id.*

To be sure, the Court emphasizes that "[i]t does not follow" that if "Congress can legislate prospectively

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[1] Three circuit courts of appeal have found that employers such as Gray were on notice that legislation, retroactive by its own terms, would alter the withdrawal liability provisions of ERISA. *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co., Inc.*, 725 F.2d 843, ..., slip op. at 942 (2nd Cir. 1984) (prior to the Act's passage, "its existence—together with its retrospective withdrawal liability provision—was a matter of public knowledge."); *Peick* v. *Pension Ben. Guar. Corp.*, 724 F.2d 1247, 1272 (7th Cir. 1983) ("During the period between April 29 and September 26, 1980, it was clear to anyone concerned about multiemployer pension plans that employers would be subjected to withdrawal liability under the [Act]. At most an employer could claim only uncertainty as to the details of this liability, not that the liability was a surprise."); *Republic Industries* v. *Teamsters Joint Council*, 718 F.2d 628, 638 (4th Cir. 1983) ("Republic had fair notice of its potential liability.").

Gray, moreover, does not deny that it had actual knowledge of the pending legislation.

it [similarly] can legislate retrospectively." *Id.* at 16. Not only must legislation be rational as prospectively applied; but, if the legislation also applies retrospectively, this application also must be rational. With such legislation, a reviewing court may apply the rationality test in two sweeps. Does the legislation, prospectively applied, employ a reasonable means to a legitimate end? If so, did Congress have a legitimate purpose in applying retrospectively its otherwise rational approach?[2]

Thus, in *Turner Elkhorn*, the Court reviewed an act of Congress whose purpose, in part, was to provide benefits to miners afflicted with pneumoconiosis. Congress' method of providing compensation had a

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[2] The Seventh Circuit has recently read *Turner Elkhorn* in just this way:

> "In cases where the legislation in question has retroactive effect, special care must be taken in applying the 'arbitrary and irrational' test to determine if there was indeed justification for the added burden which retroactive legislation imposes on those it regulates. In *Turner Elkhorn Mining*, the Court in no way indicated some special distaste for retroactive legislation, but merely stated that *not only must legislation as a whole be rational and non-arbitrary but also that any retroactive aspects of the legislation must, in particular, be rationally and non-arbitrarily related to legislative goals.*" *Peick*, 724 F.2d at 1266 (emphasis added).

See also Republic Industries (4th Cir.), 718 F.2d at 636 ("The Court prescribed as the test for validity the 'rationality' of retrospective legislation * * *.").

The Seventh Circuit, however, mistakenly reads *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), to require that the *Turner Elkhorn* rationality test be applied to the retrospective aspects of the Act "with particular attention to wheth-

(Footnote continued)

retrospective aspect in that it required mine operators to compensate former employees who terminated their work in the coal industry before the act was passed. The Court found that, with regard to all aspects of the compensation provisions, Congress had adopted "a *rational measure* to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." 428 U.S. at 18 (emphasis added). In light of Congress' purpose, "[i]t [was] enough to say that the Act approaches the problem of cost-spreading *rationally* * * *." *Id.* at 19 (emphasis added).[3]

Gray argues that the rationality of a congressional decision to apply certain legislative provisions retro-

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(Footnote continued)
er the imposition of liability during the retrospective period is so 'harsh and oppressive' that the retrospective application of the statute must be declared unconstitutional." *Peick*, 724 F.2d at 1269. The better view is that neither *United States Trust*, nor any other opinion of this Court, requires other than the simple, two-fold rationality test of *Turner Elkhorn*. Although what is rational as prospective legislation may not be rational if applied retrospectively, the same "arbitrary and irrational" standard applies in both determinations.

[3] Gray alleges that the Court "has not formulated" a "single standard" for testing retroactive legislation for substantive due process adequacy, Gray Brief at 25; Gray also implies that a standard is suggested by language in *Welch* v. *Henry*, 305 U.S. 134, 137 (1938), to the effect that only if retrospective legislation is "harsh and oppressive" is the due process clause violated. Gray is wrong in each instance. *Turner Elkhorn* endorses the "single standard" of due process analysis for assessment of both the prospective and retrospective aspects of legislation. Moreover, this Court has never relied on the language of *Welch* v. *Henry* in finding any statute in violation of the Fifth Amendment due process clause. *But see* cases cited by *Welch* v. *Henry*, 305 U.S. at 147.

spectively is not enough to meet the substantive due process requirements of the Fifth Amendment. *See* Gray Brief at 9, 13, 23. Gray's argument, however, is unconvincing. Gray argues that " '[r]ationality' is not the touchstone" of substantive due process because "[i]f it were, Congress could make every statute retroactive on the theory that retroactive application was a rational way of insuring that a new law had maximum effect." Gray Brief at 13. Obviously, Congress could not justify retrospective application of a statute simply on the "theory" that thereby the "new law [will have] maximum effect." The reason, however, is that the phrases "making an otherwise prospective law retrospective" and "increasing the time span of the law's effect" simply state the same thing in different words; and restatement does not provide anything additional in the way of justification. But then the insufficiency of Gray's proposed "theory" in no way undercuts the established position that rationality is the "touchstone" of substantive due process.

B. A Heightened Rationality Standard

Gray does not argue that the Act violates due process if legislative notice of the Act was wanting. Rather Gray maintains that if notice was not given, the retroactive features of the Act require "special justification." Gray's notion of "special justification" is of its own fashioning and begs for explanation. Since, however, this case does not involve a statute passed without legislative notice and Gray has not articulated its proposed standard of "special justification," the Trust Fund restricts its reply on this matter to the general

comment that a limiting condition on any such augmented rationality standard must be that it does not require the Court "to assess the *wisdom* of Congress' chosen scheme * * *." 428 U.S. at 18-19 (emphasis added). Thus, for instance, the much-discussed *Nachman* test would be inappropriate in this context, since, as argued by the Trust Fund in its opening brief, that test unavoidably requires inquiry into the wisdom of the examined legislation.

II. Legislative Notice

The Trust Fund's position is that, if the Court recognizes a notice requirement, normal legislative process normally affords such legislative notice.[4] In addition, the complaining party has the burden to establish a procedural due process violation, just as the complaining party has the burden to prove an alleged substantive due process violation. In this case, however, no claim of legislative impropriety has been registered.

Instead, Gray rejects the Trust Fund's position that legislative process is legislative notice and argues that the Fifth Amendment requires an opportunity to adjust to new legislation before that legislation becomes effective.

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[4] Gray goes to some lengths to insist that "Congress must give [Fifth Amendment] notice by following the Constitution's procedural requirements for the enactment of a law." Gray Brief at 8; *see also* Gray Brief at 16 and discussion of *Immigration and Naturalization Service* v. *Chadra*, ... U.S. ...., 103 S. Ct. 2764 (1983), Gray Brief at 14-16. The Trust Fund agrees. Those procedural requirements were met in this case, however. Indeed, no claim of any sort of procedural irregularity has been voiced.

Thus Gray argues that the concept of legislative notice as legislative process is "unworkable." For, Gray queries,

> "[a]t what point in the legislative process would citizens be held to constructive notice that their rights and liabilities were to be retroactively altered in the future?" Gray Brief at 19 n.7.

Gray's question, however, betrays a misconstruing of the procedural posture in which an issue of inadequate legislative notice arises.

The concept of normal legislative process, it may be granted, is not a rigid one. No single description captures how law is made. But this does not bespeak a weakness in the thesis that legislative process normally provides legislative notice. Where procedural inadequacy is the complaint, it is up to the complaining party to show how the legislative process miscarried; and undertaking this task does not require more than a quite general characterization of legislative procedure.

Gray quotes from the majority opinion in *Untermyer* v. *Anderson*, 276 U.S. 440 (1928), for the proposition that "individuals cannot be held to standards which do not yet exist." Gray Brief at 18-19. Such a contention, however, is incompatible with the constitutionality of *any* legislation with retroactive effect, a position which finds no support in the holdings of this Court, as Gray is constrained to admit. Gray Brief at 19 n.7. Furthermore, *Untermyer* can be distinguished from the case at bar. In *Untermyer*, the legislation lacked an explicit effective date. 276 U.S. at 445; *see also* 276 U.S. at 447-48 (Brandeis, J., dissenting). By

contrast, the intended retrospective application of the withdrawal liability provisions was a constant feature of the ERISA amendments from the Act's introduction to its eventual passage.[5] In addition, the *Untermyer* Court was forced to speculate upon the purpose addressed by Congress in its decision to make certain legislative provisions apply as of a pre-passage date. 276 U.S. at 450 (Brandeis, J., dissenting). In the instant case, however, Congress' purposes are plain.[6] In any case, the Trust Fund submits that, at this date, the dissenting opinion of Justice Brandeis, 276 U.S. at 446, is more persuasive than that of the majority. *See Smith* v. *Shaughnessy*, 318 U.S. 176, 179 n.1 (1943) (citing Brandeis opinion with favor).

Gray also cites to *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982), to bolster its rejection of the Trust Fund's position. *Texaco*, as Gray quotes to this Court, states that a legislature, to advise its citizens as to the effect of a law, "need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." 454 U.S. at 532. On the question of "reason-

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[5] *See, e.g., Peick* (7th Cir.), 724 F.2d at 1269 ("the intent of Congress to provide for the retrospective imposition of liability was quite clear from the very beginning of the legislative process").

[6] "Congress * * * expressly [found] that:

> withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the

(Footnote continued)

able opportunity," moreover, the Court emphasizes that it shows "the greatest deference to the judgment of state legislatures" as to whether the effective date of a statute is reasonably selected. *Id.* (citations omitted). Since Congress is entitled to no less deference, *Texaco* does not support Gray's position.

Gray would replace the Trust Fund's position on legislative notice with one which asserts that the Fifth Amendment requires "meaningful" notice of legislation, Gray Brief at 8, according to which citizens are

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(Footnote continued)

> plan, its participants and beneficiaries, and labor management relations . . .
>
> 29 U.S.C. §1001(a)(4)(A) (Supp. V 1981).

"After extensive hearings and consideration of the problem, Congress chose a solution which placed the initial burden of sustaining plan stability on withdrawing employers. The imposition of withdrawal liability upon employers who are leaving plans was chosen as the most effective measure both to reduce an employer's incentives to withdraw from a multiemployer plan and to offset the burden otherwise shifted to the remaining employers when a withdrawal nevertheless occurs." *Peick* (7th Cir.), 724 F.2d at 1267.

In addition, "Congress [concluded] that it was necessary to impose the added burden of retrospectivity to fully effectuate Congress' purpose in enacting the [Act]. * * * Congress was concerned that employers would be encouraged to withdraw while the legislation was under consideration if the statute became effective only upon enactment." *Id.* at 39. *See also, Textile Workers* (2nd Cir.), slip op. at 947 ("One of the flaws Congress had perceived in ERISA was its potential for encouraging early withdrawals. It was precisely this built-in weakness that Congress sought to remedy by making the Act retrospective."); *Republic Industries* (4th Cir.), 718 F.2d at 689.

entitled to "adequate opportunity to plan or to conform [their] post-enactment behavior to the law's new requirements." Gray Brief at 20; *see also* Gray Brief at 12, 17-18, 19-20, 24, 60. This position leads Gray to claim that retroactive legislation "by its very nature, provides no notice in the constitutional sense." Gray Brief at 30. Until the law is passed, citizens cannot know what the law will be, *see* Gray Brief at 24; they thus are deprived of the opportunity to assess the implications of the legislation and adjust their affairs.

Gray's reasoning, however, "proves" more than this Court can accept. If, for the reason Gray offers, retrospective legislation fails to provide adequate advance notice, wholly prospective legislation as well would suffer a notice failing. The Act, for instance, became effective the day it became law. Meaningful notice, according to Gray, requires an opportunity to plan one's affairs in the light of the actual law. Planning takes time. Thus, Gray's position necessitates that the citizenry had not received notice of any aspect of the Act on the day it became law. Moreover, this is equally the case with any legislation which becomes effective immediately upon enactment. The consequences of Gray's position, thus, are far reaching. With regard to all immediately effective legislation, either Congress must provide some form of notice, as yet undefined, which goes beyond that provided by the normal legislative processes of our constitutional system, or the judiciary will have to impose an as yet unformulated higher standard of substantive due process review. The

first course simply is not practicable.[7] The second would require the rejection of the long-standing rule of this Court, adhered to out of deference to its co-equal branches of government, of presuming the constitutionality of duly-enacted laws.

III. The Rationality of the Act

The parties have urged upon this Court competing standards of due process review. The Trust Fund argues that the traditional means-ends rationality test applies. Gray would have the Court fashion a heightened standard of review requiring "special justification" of the Act. Under either standard, however, the retroactive aspects of the Act pass review.

The issue is whether Congress acted rationally in setting a pre-enactment effective date for the withdrawal liability provisions of the Act. If the Court restricts itself to the traditional means-ends inquiry, there can be little doubt of the Act's constitutionality. Gray, moreover, does not contend to the contrary. Congress was concerned with the financial soundness of multiemployer pension plans.[8] "The imposition of withdrawal liability upon employers who are leaving plans was chosen," in the words of the recent Seventh

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[7] "As a practical matter, a [government] cannot afford notice to every person who is or may be affected by a change in the law." 454 U.S. at 444.

[8] As this Court previously has noted, "Congress amended ERISA in 1980 to strengthen the funding requirements and enhance the financial stability of multiemployer pension plans." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 338, n. 22 (1981).

Circuit opinion, "as the most effective measure both to reduce an employer's incentives to withdraw from a multiemployer plan and to offset the burden otherwise shifted to the remaining employers when a withdrawal nevertheless occurs." *Peick*, 724 F.2d at 1267. In addition, the Seventh Circuit further found "it was necessary to impose the added burden of retrospectivity to fully effectuate Congress' purpose in enacting the [Act]." *Peick*, 724 F.2d at 1269. Under the traditional analysis, therefore, the Act is constitutional.

This conclusion would not be disturbed, moreover, if the Act were judged in terms of a heightened rationality standard, as Gray requests.[9] The *Nachman* analysis has proved a popular approach to the due process issue here presented. However, for the reasons given above and in the Trust Fund's opening brief the *Nachman* test should not be applied in this instance. Nonetheless, subsequent to the Ninth Circuit's decision here on appeal, three circuit courts of appeal have

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[9] Much of what Gray argues is not focused directly upon the retrospective aspects of the Act. Section II.4., in particular, contains several assertions which, although disputable, would, even if accepted, apply to the Act in its *prospective*, as well as its retrospective, application. For instance, Gray claims that "neither the fact nor the timing of withdrawal is in the employer's hands alone," Gray Brief at 50, and also that Congress has supplied organized labor with a "new weapon for use in collective bargaining," Gray Brief at 52 n.24. An apparent purpose of Gray's in advancing these allegations is to cast itself, as a withdrawing employer, in the role of the helpless victim. Such a view of events, however, overlooks the fact that for some time prior to its withdrawal Gray had made known and acted upon its desire to go nonunion. Joint Appendix at 143.

found that the Act displays no constitutional failing even if it were to be judged by the *Nachman* standard. *Peick* (7th Cir.), 274 F.2d 1270-74; *Textile Workers* (2nd Cir.), 725 F.2d at ....., slip op. at 941-950; *Republic Industries* (4th Cir.), 718 F.2d at 638-639. The Trust Fund respectfully refers this Court to those opinions for discussion supplementing the briefs in this case. If the retrospective aspects of the Act withstand scrutiny under the *Nachman* test, *a fortiori* they pass review under any test for *rationality*.

CONCLUSION

Gray raises two due process complaints, one procedural, the other substantive. Neither has merit, a conclusion more particularly evident when the distinct claims are kept separate. Gray complains that it did not receive notice of the Act; yet the legislative process, as conducted in this instance, provides public notice. More cannot be required. Gray also complains that the Act, in its retrospective application, is substantively inadequate. Rationality is the test of the substantive adequacy of legislative regulation of economic affairs. Did Congress adopt a reasonable approach to a legitimate end in selecting a pre-enactment effective date for the withdrawal liability provisions of the Act? So assessed, the Act easily passes review, a conclusion Gray does not deny. Gray would have this Court apply some stricter standard; but under our constitutional system, Congress legislates. It is thus appropriate, as has been this Court's counsel, that those who find legislation such as the Act unwise or unfair take their

grievances back to Congress. The disputed provisions of the Act suffer no due process failing. The Ninth Circuit's decision to the contrary should be reversed.

Respectfully submitted,

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March 22, 1984